SUPREME COURT, U. S.

No. 337

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In the Supreme Court of the United States

OCTOBER TERM, 1970

THOMAS TIERNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 424 F. 2d 643.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1970. A petition for rehearing was denied on May 27, 1970. The petition for a writ of certiorari was filed on June 30, 1970, and is there-

fore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's acquittal of conspiracy to counterfeit at a trial where the jury could not agree as to two substantive counts of aiding and abetting counterfeiting, barred, under the doctrine of collateral estoppel, petitioner's subsequent trial for the substantive offenses.

2. Whether the court erred in refusing to furnish the transcript of the grand jury testimony of a contemplated defense witness in advance of the witness testifying for the defense at trial.

STATEMENT

1. After a jury trial in the United States District Court for the Central District of California, petitioner was convicted on Counts 2 and 3 of an indictment of aiding and abetting the counterfeiting of United States currency, in violation of 18 U.S.C. 471 (1 R. 2-5).[1] At an earlier trial in November 1967, petitioner had been acquitted by a jury on Count 1 of the same indictment of conspiring to make and sell counterfeit money, but that jury had been unable to agree on a verdict as to the aiding and abetting (5 R. 786-787).[2] On February 5, 1969, petitioner

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[1] "R." preceded by the volume number refers to the ten-volume record on file with the Clerk of this Court.

[2] An earlier trial, commenced in October 1967 on all three counts, resulted in a mistrial.

was sentenced to four years' imprisonment on each count (Counts 2 and 3), to be served concurrently, with parole eligibility to be determined under the provisions of 18 U.S.C. 4208(a)(2) (1 R. 316).

The evidence showed that in mid-1966, in California and Nevada, petitioner, through a corporate entity, operated a mail order novelty business which owned cameras and printing equipment, and employed a printer named Davenport (6 R. 130-131, 167, 171, 7 R. 337, 340). In showing his plant to his brother-in-law, one King, and an acquaintance named Mike Francis, petitioner stated that he could print anything, even money (7 R. 432).

Shortly after petitioner's initial meeting with Francis, another meeting was held in which the subject of printing counterfeit money was discussed. Petitioner called Davenport from his work to attend this meeting in petitioner's office. After Davenport agreed to aid in the printing of 100,000 counterfeit $10 bills, petitioner gave him the genuine $10 bills required to make the necessary plates for reproducing the bogus bills (7 R. 340, 348, 435, 490). Later, during May 1966, Davenport and King operated the presses, with petitioner being present at the plant during part of the time the printing operation was in progress (7 R. 351, 504).

Following the printing, King left the west coast area with some of the money (6 R. 161-163, 179, 7 R. 353, 8 R. 607-608). In the two-month interim after

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Under Count 2, petitioner was charged with aiding and abetting these two individuals in the manufacture of counterfeit $10 Federal Reserve notes (1 R. 5).

the May 1966 printing, over $100,000 of counterfeit $10 bills were passed in the Los Angeles area (8 R. 556). On July 25, 1966, Francis was arrested in California, for selling and possessing counterfeit $10 bills. He offered his assistance to the Secret Service (6 R. 277, 8 R. 557), and was then asked to introduce an undercover agent as a prospective buyer to the people engaged in printing the counterfeit money (7 R. 314). At this time, the Secret Service believed that the counterfeiters were planning a second printing of bogus $20 bills (8 R. 561, 564).

In late July and early August 1966, Francis met with petitioner and the corporation's vice-president, one Davidson, who had aided in the concealment of the evidence of the first printing (6 R. 169, 173, 178). A second printing was agreed upon, and Davenport, the printer, was again employed (6 R. 182, 184). Petitioner gave Davidson $1,000 for the necessary supplies (6 R. 189), and gave Davenport the genuine $20 bills that Davenport needed to make the negatives.[1] He also furnished and shipped from Nevada to California the equipment that Davenport needed to do the printing (6 R. 199-203). After the printing, Davidson and Davenport sought to make delivery to the undercover agent that Francis had introduced as a prospective buyer. They were then arrested (6 R. 134, 205-206).

2. Francis was given immunity, and testified before the grand jury (8 R. 543-544). Due to his sub-

[1] Under Count 3, petitioner was charged with aiding and abetting Davenport and Davidson in the manufacture of counterfeit $20 Federal Reserve notes (1 R. 6).

sequent disappearance, however, he was not available as a witness at the trial in November 1967 (8 R. 544-545), but he was located shortly before commencement of the instant 1968 trial. Francis retained an attorney who arranged for Francis to confer with petitioner's attorney (8 R. 604-605). Later, in interviewing Francis as to his expected testimony, the prosecutor learned of this conference with the defense counsel and of changes in Francis' version of events. In the prosecutor's opinion, such "alleged facts" newly related by Francis could be considered favorable to the defense. At the outset of the trial, the prosecutor disclosed these developments to the court and stated that the government would not call Francis as a prosecution witness. He informed the defense that Francis would be available as a defense witness (10 R. 23-24, 26, 90). The defense then requested a copy of the transcript of Francis' grand jury testimony. The government opposed this request and the court, after holding its ruling in abeyance, denied the request (10 R. 89-90, 7 R. 400-407). Although the petitioner's counsel indicated in his opening statement and twice following the denial of his request for a copy of the grand jury transcript that Francis would be called as a witness (10 R. 90, 120, 7 R. 419, 595), Francis was not called upon to testify at trial.

ARGUMENT

As noted, the petition is out of time. In any event, it presents no issue of merit.

1. The court below, in accordance with its earlier opinion in *Cosgrove* v. *United States*, 224 F.2d 146,

assumed that where the jury acquitted as to one count and disagreed as to others, the doctrine of collateral estoppel applied with respect to retrial on counts on which there had been disagreement. See *Ashe* v. *Swenson*, 397 U.S. 436. It found on the basis of the facts, however, that acquittal on the conspiracy count did not necessarily represent a determination that petitioner had not aided and abetted the counterfeiters.

This ruling is supported by the facts. The first jury could have found only that petitioner had not been a general partner in the counterfeit operation and thus was not a part of the overall conspiracy. The evidence, for example, did not show that petitioner profited from the printing of the counterfeit bills. The evidence clearly established, however, that petitioner furnished facilities essential to the reproduction of counterfeit money by King, Davenport and Davidson, the persons he was charged with aiding and abetting under Counts 2 and 3. Thus, the finding of the first jury that petitioner was not a partner in the criminal venture masterminded by King and Francis, was not inconsistent on this record with the finding of the second jury that petitioner had been a willing helper, one who wanted the criminal enterprise or partnership of the others to succeed (see 9 R. 850). One need not be a conspirator to aid and abet another person to do a criminal act. See *Nye & Nissen* v. *United States*, 336 U.S. 613, 620.

2. As the court below correctly held, the trial judge acted within his discretion in refusing access to Francis' grand jury testimony, in advance of his taking

the stand as a defense witness. The defense had interviewed Francis before trial and therefore knew what he was prepared to say helpful to the defense. Thus, no right of discovery is here involved. Petitioner was given the name of the exculpatory witness so that there was compliance with *Brady* v. *Maryland*, 373 U.S. 83.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[5] The trial court noted that the defense had interviewed Francis and thereafter indicated it would call Francis as a defense witness. The court offered to read the transcript *in camera* to determine if it contained information favorable to the defense and, if so, to furnish the transcript in advance of Francis' appearance on the stand, and, if not, to furnish the transcript as soon as Francis' direct examination was finished. The defense declined this offer (7 R. 400-407).

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